

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

In re: Matt Shirk,

DOAH Case No. 19-3434EC

Respondent.

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JOINT PRE-HEARING STIPULATION

Pursuant to the Administrative Law Judge's Pre-Trial Order, the Advocate for the Florida Commission on Ethics and Respondent, Matt Shirk, Esquire, hereby submit this Pre-Hearing Stipulation in this cause scheduled for final hearing on August 23, 2019 at 9:00 a.m. in Jacksonville, Florida.

This document represents the parties' positions and indicates the matters in which the parties' disagree.

A. NATURE OF THE CONTROVERSY

I. Advocate's Position

This is an action before the Commission on Ethics which has been brought against Respondent, Matt Shirk, pursuant to Part III, Chapter 112, Florida Statutes.

The issues on which there are no disputed facts are:

- (1) Respondent, Matt Shirk, violated Section 112.313(6), Florida Statutes, by hiring or directing the hiring of women, contrary to procedures, policies, or qualifications, or outside of normal hiring practices, engaging in workplace or work-related interactions with them of personal interest to himself and unrelated or marginally related to the function of the Public Defender's Office, and terminating them or having them terminated from their employment at the Public Defender's Office for the private benefit of himself, his wife, and their marriage.
- (2) Respondent, Matt Shirk, violated Section 112.313(6), Florida Statutes, by serving or consuming alcoholic beverages in a City building (offices of the Public Defender) contrary to a City Code provision.

The issues on which there are disputed facts and require a final hearing are:

- (3) Whether Respondent, Matt Shirk, violated Section 112.313(8), Florida Statutes, by revealing information relating to the representation of a client, obtained in his capacity as Public Defender, via an interview he gave to a documentary crew interested in the client's case and, if so, what is the appropriate penalty?

In order to prevail, the Commission Advocate must prove the elements of Section 112.313(8), Florida Statutes, by clear and convincing evidence.

II. Respondent's Position

Please see below

B. STATEMENTS OF POSITION

I. Advocate's Position

Respondent was first elected to the position of Public Defender in November 2008 and took office in January 2009. He was reelected in November 2012. Governor Rick Scott directed State Attorney William P. Cervone, Eighth Judicial Circuit of Florida, to convene a Grand Jury to conduct an investigation into allegations of wrongdoing reported by various news media against Respondent. The Presentment of the Grand Jury (Presentment) directed State Attorney Cervone to provide a copy of the Presentment to the Commission on Ethics (Commission). On January 9, 2015, the Commission received the referral naming Respondent as the subject.

Allegation I

Respondent ADMITS the facts of this allegation.

Allegation II

Respondent ADMITS the facts of this allegation.

Allegation III

Respondent DENIES this allegation.

Disclosure of Confidential Information

Cristian Fernandez was 12 years old when he was charged as an adult with first degree murder of his younger brother. In early 2011, the Public Defender's Office was appointed to represent Fernandez. A group of private attorneys offered to assist the Public Defender and provided their services pro bono. For a period of time, the Public Defender's Office and the private attorneys worked in "relative harmony."

On or about December 21, 2011, a guardian ad litem was appointed for Fernandez to "stand in the stead of the parent to make decisions for Cristian [Fernandez]."¹ Shortly thereafter, the private attorneys successfully petitioned the court to remove the Public Defender's Office from the case.

The case garnered worldwide attention before the Public Defender's removal from the case and Respondent received and answered media inquiries on a regular basis. The private attorneys became concerned that Respondent was publicly speaking about the case and disclosing confidential information to the media and other third-parties in violation of the Florida Bar's Rules of Professional Conduct. Specifically, Respondent appeared in a documentary titled "Juvenile Lifers" where he provided privileged details such as telling the audience that Fernandez told him that his mother, rather than he, actually killed his brother.

In conclusion, Respondent disclosed and/or used information which was not available to members of the general public and gained only by reason of Respondent's position as the Public Defender. Such disclosure was made with an intent to secure a personal gain or benefit of Respondent, whether it be to reap local, national, and international recognition and acclaim, to promote and bolster his "public image," or for some other benefit for himself or another.

¹ Fernandez's mother's parental rights were terminated by the court and the child's father has never been "in the picture."

As to all the allegations, the clear and convincing evidence will show that Respondent's actions were in violation of the Code of Ethics.

II. Respondent's Position

It is the Respondent's position that the information disclosed to the documentary film crew was:

1. Generally known to the public
2. Was not intended by Mr. Fernandez to be confidential
3. The information served the client's interest and not specifically required to be confidential.

The statement to the documentary film crew was exculpatory in nature and was generally known and believed by the members of the public from all over the world. The Advocate takes the position that Mr. Fernandez needed to sign informed consent based on the Florida Bar Rules of Professional Conduct. However, pursuant to Rule 4-1.6(c) and Rule 4-1.9, informed consent is not required or necessary. "Information that has been widely disseminated by the media to the public, or that typically would be obtained by any reasonably prudent lawyer who had never represented the former client, should be considered generally known and ordinarily will not be disqualifying."

The private attorneys in this case did not petition the court to have the Office of Public Defender removed from the case. The private attorney's offered to take over the case pro bono and the Office of the Public Defender moved to withdraw. At the time of the withdrawal, Mr. Cox, one of the pro bono private attorneys, said on the record that the Office of the Public Defender had done a good job representing Mr. Fernandez.

Furthermore, the statement made to the documentary film crew was made after Mr. Fernandez had entered a plea and was sentenced and the case was completed.

C. EXHIBITS

As to any items in the following list of exhibits, there are no stipulations.

Joint Exhibits

None.

I. Advocate's Exhibits: (have been or will be provided to Respondent)

- (1) The Florida Bar Rules of Professional Conduct, Rule 4-1.6, Confidentiality of Information
- (2) DVD and/or Transcript: "Concluding Portion of Documentary" and/or "Juvenile Lifers"
- (3) E-mail from Matt Shirk to Henry Cox, Re: our conversation yesterday, Thursday, February 9, 2012
- (4) Grand Jury Presentment, December 16, 2014
- (5) The following documents were filed in: *State of Florida vs. Cristian Fernandez*, Case No. 16-2011-CF-00622, In the Circuit Court, Fourth Judicial Circuit, In and For Duval County, Florida
 - a. *State of Florida vs. Cristian Fernandez*, Indictment for Murder in the First Degree; Aggravated Child Abuse
 - b. Order Determining Eligibility for Court-Appointed Counsel
 - c. Waiver of Speedy Trial
 - d. Order Concerning Transfer
 - e. Temporary Protective Order
 - f. Motion to Disqualify Judge
 - g. Motion for Reasonable Pretrial Detention
 - h. Motion to Clarify Pretrial Publicity Order and Memorandum of Law in Support
 - i. Temporary Protective Order
 - j. Amended Protective Order
 - k. Motion for Substitution of Counsel Upon the Direction of the Guardian Ad Litem
 - l. Consent Order Appointing Guardian Ad Litem
 - m. Amended Motion to Appoint Guardian Ad Litem
 - n. Memorandum of Law in Support of Motion to Dismiss Unconstitutional Indictment
 - o. Order of Substitution of Counsel
 - p. Motion to Prohibit the Public Defender from Making Extra-Judicial Statements About Pending Proceedings

- q. Order Granting, In Part, and Denying, In Part, Defendant's Motions to Suppress Statements
- r. Order of Continued Confidentiality
- s. Plea of Guilty to Lesser Included Offenses

- (6) Report of Dr. D. Fassler
- (7) Report of Dr. M. Beyer
- (8) Report of Dr. W. Meadows
- (9) Florida Bar Member Profile for Matt Shirk
- (10) Investigator's Report of Investigation, Florida Commission on Ethics
- (11) Any exhibits produced at the final hearing by Respondent

II. Respondent's Exhibits

None.

D. NAMES AND ADDRESSES OF WITNESSES

I. Advocate's Witnesses:

- (1) Matthew Shirk, Respondent
- (2) Henry (Hank) Cox, Esquire
Bedell, Dittmar, DeVault, Pillans & Cox, P.A.
101 East Adams Street
Jacksonville, FL 32202
904-353-0211
hmc@bedellfirm.com
- (3) Hugh Cotney, Esquire
Guardian Ad Litem for Cristian Fernandez
Hugh Cotney, P.A.
233 East Bay Street, #905
Jacksonville, FL 32202
904-356-0162
- (4) George E. "Buddy" Schulz, Jr., Esquire
Holland & Knight LLP
50 North Laura Street, Suite 3900
Jacksonville, Florida 32202
(904) 798-5462

buddy.schulz@hklaw.com

- (5) D. Gray Thomas, Esquire
Law Office of D. Gray Thomas
215 North Washington Street
Jacksonville, Florida 32202
(904) 356-9661
dgraythomas.law@gmail.com

The above-referenced attorneys represented Cristian Fernandez during the criminal proceedings. I anticipate attorneys 2, 3, 4, and 5 will testify that Fernandez did not have the mental capacity to waive his attorney-client privilege. They will testify as to their efforts to squelch Respondent's extrajudicial comments.

- (6) Dr. D. Fassler (802) 865-3450
- (7) Dr. M. Beyer (703) 966-8336
- (8) Dr. W. Meadows (904) 327-4686
- (9) Stephen I. Bloomfield, Ed.D., Licensed Psychologist
Past President, Florida Psychological Association
Federal Advocacy Coordinator (FPA/APA)
3725 Dupont St. Ct. S.
Jacksonville, FL 32217
(904) 448 1519-office
(904) 210-7466-cell

I anticipate the above-referenced doctors will testify as to Fernandez's mental capacity at the relevant time.

- (10) Investigator Thomas Reaves, Florida Commission on Ethics, c/o Elizabeth Miller, Advocate, 850-414-3702 or Elizabeth.miller@myfloridalegal.com
- (11) Any witnesses called to testify by Respondent

II. Respondent's Witnesses

- (1) Cristian Fernandez, (last known address) 1010 Riviera Street, Jacksonville, Florida

E. FACTS WHICH ARE ADMITTED AND WILL REQUIRE NO PROOF AT HEARING

(1) Respondent admitted violations of Allegations I and II. Thus, there is no disagreement that facts prove by clear and convincing evidence all the elements of violations under Allegations I and II.

(2) Respondent has been a member in good standing in the Florida Bar since April 12, 2000. His Florida Bar Number is 195911.

(3) Respondent was elected in 2008 as the Public Defender for Florida's Fourth Judicial Circuit and served two terms (8 years).

(4) The Office of the Public Defender for the Fourth Judicial Circuit of Florida was appointed to represent Cristian Fernandez in Case No. 11-18606 on June 4, 2011.

(5) Respondent was interviewed by producer(s) or individual(s) filming a documentary titled "Juvenile Lifers" on or about February 20, 2013, and spoke about conversations he had with Cristian Fernandez.

F. ISSUES OF LAW ON WHICH THERE IS AGREEMENT

All issues that prove Respondent violated Allegations I and II.

I. Advocate's Position

1. Respondent is subject to the requirements of Part III, Chapter 112, Florida Statutes, the Code of Ethics for public officers and employees, for his acts and omissions during his tenure as Public Defender.

2. The Commission on Ethics has jurisdiction over this matter to determine whether any violations have occurred. § 112.324, Fla. Stat.

3. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. § 120.57(1), Fla. Stat.

4. Section 112.322, Florida Statutes, and Rule 34-5.0015, Florida Administrative Code, authorize the Commission on Ethics to conduct investigations and to make public reports on complaints concerning violations of Part III, Chapter 112, Florida Statutes (Code of Ethics for Public Officers and Employees).

5. The burden of proof, absent a statutory directive to the contrary, is on the Florida Commission on Ethics, the party asserting the affirmative of the issue of these proceedings. *Department of Transportation v. J.W.C. Co., Inc.*, 396 So. 2d 778 (Fla. 1st DCA 1981); *Balino v. Department of Health and Rehabilitative Services*, 348 So. 2d 349 (Fla. 1st DCA 1977). In this proceeding, it is the Commission, through its Advocate, that is asserting the affirmative: that Respondent violated Section 112.313(6), Florida Statutes, on two counts, and one count of Section 112.313(8), Florida Statutes. Commission on Ethics proceedings which seek recommended penalties against a public officer or employee require proof of the alleged violation(s) by clear and convincing evidence. *See Latham v. Florida Comm'n on Ethics*, 694 So. 2d 83 (Fla. 1st DCA 1997). Therefore, the burden of establishing by clear and convincing evidence the elements of Respondent's violations is on the Commission.

As noted by the Supreme Court of Florida:

[C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re: Davey, 645 So. 2d 398, 404 (Fla. 1994, quoting *Slomowitz v. Walker*, 429 So. 2d 797, 800

(Fla. 4th DCA 1983). The Supreme Court of Florida also explained, however, that, although the "clear and convincing" standard requires more than a "preponderance of the evidence," it does not require proof "beyond and to the exclusion of a reasonable doubt." *Id.*

6. Section 112.313(8), Florida Statutes, the provision with which Respondent was charged, provides as follows:

DISCLOSURE OR USE OF CERTAIN INFORMATION. No public officer, employee of an agency, or local government attorney shall disclose or use information not available to members of the general public and gained by reason of his or her official position for his or her personal gain or benefit or for the personal gain or benefit of any other person or business entity.

7. In order to establish a violation of Section 112.313(8), Florida Statutes, the following elements must be proved:

1. Respondent must have been a public officer or employee.
2. Respondent must have disclosed or used information which was:
 - a) not available to members of the general public
 - and
 - b) gained by reason of Respondent's official position.
3. Such information must have been disclosed or used with an intent to secure a personal gain or benefit for Respondent or another person or business entity.

II. Respondent's Position

Left blank intentionally.

G. ISSUES OF FACT WHICH REMAIN TO BE LITIGATED

I. Advocate's Position

Whether Respondent, Matt Shirk, violated Section 112.313(8), Florida Statutes, by revealing information relating to the representation of a client, obtained in his capacity as Public Defender, via an interview he gave to a documentary crew interested in the client's case.

II. Respondent's Position

Left blank intentionally.

H. ISSUES OF LAW WHICH REMAIN FOR ADMINISTRATIVE LAW JUDGE'S DETERMINATION

I. Advocate's Position

Whether Respondent, Matt Shirk, violated Section 112.313(8), Florida Statutes, by revealing information relating to the representation of a client, obtained in his capacity as Public Defender, via an interview he gave to a documentary crew interested in the client's case.

II. Respondent's Position

Left blank intentionally.

I. DISAGREEMENTS AS TO APPLICATION OF RULES OF EVIDENCE

There are no disagreements as to application of rules of evidence. The parties agree that evidence may be taken in accordance with Sections 120.569 and 120.57, Florida Statutes.

J. PENDING MOTIONS

Advocate's Motion for Official Recognition will be filed by August 15, 2019. The parties reserve the right to make motions in limine and/or other motions before and during the trial.

K. ESTIMATED LENGTH OF TIME REQUIRED FOR HEARING

The parties estimate that one day should be sufficient time for the final hearing in this case.

Respectfully submitted this 14th day of August, 2019.

Respondent:

/s/

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Jacksonville, Florida 32202

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Advocate:



ELIZABETH A. MILLER

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